

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Federal Trade Commission,

Plaintiff,

v.

Matthew J. Loewen, et al.,

Defendants.

CASE NO. C12-1207MJP

ORDER ON PLAINTIFF'S EX
PARTE MOTION FOR A
TEMPORARY RESTRAINING
ORDER AND EX PARTE MOTION
TO SEAL

This matter comes before the Court on Plaintiff's ex parte motion for a temporary restraining order and Plaintiff's ex parte motion to seal the entire docket. (Dkt. Nos. 2, 3.) Having reviewed the motions and the remaining record (Dkt. Nos. 1, 4, 5, 6), the Court DENIES Plaintiff's motion for a TRO for failure to adequately explain why an ex parte TRO is justified in this case. However, the Court grants Plaintiff leave to amend its motion to explain why Defendants are likely to dissipate assets or destroy evidence. The Court GRANTS Plaintiff's motion to seal and orders the record sealed until 72 hours after a TRO is issued or until all Defendants have been served, whichever occurs first.

Background

Plaintiff Federal Trade Commission alleges that Defendant Matthew J. Loewen and four companies he controls operate a fraudulent telemarketing scheme targeting consumers who attempt to sell their vehicles on craigslist.org and ebay.com. (Dkt. No. 3 at 2.) The FTC alleges that Defendants contact consumers and tell them they have already found, or surely will find, a buyer for the consumer's vehicle. (*Id.*) Defendants then allegedly offer to connect the buyer with the seller for a \$399 finder's fee. (*Id.*) Defendants allegedly also promise that, for an additional fee of \$99, the consumer can be guaranteed a refund in the unlikely event that the sale falls through. (*Id.* at 6.) However, Plaintiff alleges that once consumers pay the fee, Defendants do not fulfill any of their promises. (*Id.* at 2.) Defendants also allegedly refuse to process refunds. (*Id.*)

Plaintiff alleges that the Defendants' telemarketing scheme violates § 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), which prohibits unfair and deceptive acts or practices in or affecting commerce, and the FTC's Telemarketing Sales Rule, 16 C.F.R. Part 310, which prohibits material misrepresentations in offering or selling goods or services, including misrepresentations regarding refund or cancellation policies. (Dkt. No. 3 at 2.) Plaintiff seeks this TRO pursuant to § 13(b) of the FTC Act, 15 U.S.C. 53(b).

This case has a cross-border component that underlies Plaintiff's assertion that a TRO is necessary. Defendant Matthew J. Loewen is a resident of British Columbia, Canada, and is the sole owner and operator of the four defendant companies. (Dkt. No. 3 at 3.) The defendant companies include two Canadian LLCs (0803065 B.C. Ltd and 0881046 B.C. Ltd), a Nevada corporation (ReadyPay Services, Inc.), and a Nevada LLC (Xavier Processing Services, LLC). (Dkt. No. 3 at 3-4.) The two American entities share the same registered address in Henderson, Nevada, but they have no known physical presence in the United States. (*Id.* at 4.)

Plaintiff claims that a TRO should be entered without notice to Defendants because “ex parte relief is indispensable to preserving the status quo and securing full and effective relief pending a hearing on the preliminary injunction.” (Dkt. No. 3 at 22.) Plaintiff cites to a number of district court cases, including two in the Western District of Washington, *FTC v. MCS Programs, LLC*, C09-5380-RBL (W.D. Wash. 2009) and *v. BC Ltd., 0763496, et al, C07-1755-RSM* (W.D. Wash. 2007), where the district court has granted an ex parte TRO request by the FTC in order to freeze a defendant’s assets. (Dkt. No. 6 at 4.)

Discussion

1. Legal Standard

Plaintiff seeks this TRO under § 13(b) of the FTC Act, which states that a court may issue a temporary restraining order against practices that violate any of the laws enforced by the FTC. 15 U.S.C. § 53(b). In considering whether to grant the FTC’s application for a TRO under § 13(b), the Court need only consider two factors: (1) “the likelihood the FTC will ultimately succeed on the merits,” and (2) a “balance of the equities.” *FTC v. Affordable Media*, 179 F.3d 1228, 1233 (9th Cir. 1999). The FTC “need not show irreparable harm.” *Id.*

However, § 13(b) of the FTC Act explicitly requires notice to the defendant before a TRO or preliminary injunction may be issued. The statute states, “Upon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest, *and after notice to the defendant*, a temporary restraining order or a preliminary injunction may be granted without bond[.]” 15 U.S.C. § 53(b) (emphasis added).

Federal Rule 65(b) permits the issuance of an ex parte TRO, but only if (1) specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition, and (2) the

1 movant's attorney certifies in writing any efforts made to give notice and the reasons why it
 2 should not be required. Fed. R. Civ. P. 65(b); see also Belgard v. Hawaii, 883 F. Supp. 510, 517
 3 (D. Haw. 1995); Inland Empire Enters., Inc. v. Morton, 365 F. Supp. 1014, 1018-19 (C.D. Cal.
 4 1973). Because an ex parte order "runs counter to the notion of court action taken before
 5 reasonable notice and an opportunity to be heard has been granted both sides of a dispute," the
 6 requirements of Rule 65(b)(1) must be scrupulously observed. Granny Goose Foods, Inc. v.
 7 Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70, 415 U.S. 423, 438-39 (1974).

8 2. Notice

9 Plaintiff FTC fails here to meet either the notice requirement of § 13(b) of the FTC Act or
 10 the heightened standards of Federal Rule 65(b) to allow the entry of a TRO without notice. This
 11 is not a trivial concern. "The right to be heard before being condemned to suffer grievous loss of
 12 any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a
 13 principle basic to our society." Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (citations
 14 omitted).

15 Plaintiff does not assert that it has met the notice requirement of § 13(b) of the FTC Act,
 16 but it does assert it has met the requirements of Rule 65(b). (Dkt. No. 3 at 22.) Under Federal
 17 Rule 65(b), courts have recognized "a very narrow band of cases in which ex parte orders are
 18 proper because notice to the defendant would render fruitless the further prosecution of the
 19 action." Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006). However,
 20 "the applicant must do more than assert that the adverse party would dispose of evidence if given
 21 notice." Id., citing First Tech. Safety Sys., Inc. v. Depinet, 11 F.3d 641, 650 (6th Cir. 1993).
 22 "[P]laintiffs must show that defendants would have disregarded a direct court order and disposed
 23 of the goods within the time it would take for a hearing . . . [and] must support such assertions by
 24 showing that the adverse party has a history of disposing of evidence or violating court orders or

1 that persons similar to the adverse party have such a history.” Reno Air, 452 at 1131, citing In
2 the Matter of Vuitton et Fils S.A., 606 F.2d 1, 4-5 (2d Cir. 1979).

3 While the Ninth Circuit has allowed a plaintiff to justify an ex parte TRO based on its
4 experience with other defendants in similar cases, Plaintiff’s proposed category of “defendants
5 who receive notice of an FTC action” is too broad to justify an ex parte TRO. (Dkt. No. 6 at 5.)
6 In Vuitton, the Second Circuit approved an ex parte TRO when Plaintiff pointed to its experience
7 in eighty-four previous actions against counterfeiters where its litigation efforts were foiled
8 because a counterfeiter, after receiving notice of an impending injunction, and before the court
9 could hold a hearing, transferred its inventories to others. 606 F.2d at 2. In Vuitton, the Second
10 Circuit found that Plaintiff’s category of “counterfeiters” was narrow enough to satisfy the
11 requirements of due process and Rule 65. Id. However, the general rule is that evidence must
12 relate specifically to the individual defendants to be enjoined. See Conn. Gen. Life Ins. Co. v.
13 New Images of Beverly Hills, 321 F.3d 878, 881 (9th Cir. 2003) (ex parte TRO is reasonable
14 given the defendants’ “history of fraudulent intra-family transfers, their refusal to disclose asset
15 information in defiance of court order and their convenient divorce settlement”). Plaintiff offers
16 no such evidence here.

17 The cases cited by Plaintiff also do not support Plaintiff’s assertion that an ex parte TRO
18 is appropriate. In Calero v. Pearson Yacht Leasing Co., the Supreme Court held that an ex parte
19 TRO may be appropriate when “preseizure notice and a hearing might frustrate the interests
20 served by the statutes, since the property seized . . . will often be of a sort that could be removed
21 to another jurisdiction, destroyed, or concealed if advance warning of confiscation were given.”
22 416 U.S. 663, 679 (1974). The property at issue in Calero was a yacht, a vehicle which the Court
23 determined was uniquely capable of being removed from the jurisdiction, not a business with an
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1 office and dozens of employees, as is the case here. Id. Plaintiff also cites AT&T Broadband v.
2 Tech Commc'ns, Inc., an Eleventh Circuit case, for the proposition that ex parte relief is proper
3 if providing notice to the defendant would render fruitless the further prosecution of the action.
4 381 F.3d 1309, 1319 (11th Cir. 2004). However, the Eleventh Circuit in that case relied on
5 evidence specific to the individual defendant that led the court to conclude that he was likely to
6 “secret[e] evidence once notice of a pending search was given.” Id. While courts have been
7 slightly more deferential in granting preliminary relief sought by the government than by self-
8 interested private parties, the Supreme Court has consistently held that ex parte relief must be
9 limited to “extraordinary” situations. See, e.g., Calero, 416 U.S. at 679-80.

10 Plaintiff does not provide any evidence that this is an “extraordinary” situation. Plaintiff
11 asserts, “In the FTC’s experience, in cases such as this, where the Defendants’ business
12 operations are rife with fraud, where the Defendants go to great lengths to conceal their identity
13 and location, where they operate from outside the territorial jurisdiction of the United States, and
14 where consumer funds are diverted to foreign bank accounts, there is a strong likelihood that the
15 Defendants will attempt to dissipate assets or destroy evidence during the pendency of this
16 action.” (Dkt. No. 3 at 22.) Without more detail, this says little more than that Defendants have
17 been accused fraud and that they are foreign. The Court has found nothing in the record that
18 explains why these particular Defendants, or even people like them, are likely to dissipate assets.
19 Plaintiff also does not reconcile its allegation that Defendants will destroy evidence with
20 contrary evidence in the record. For example, Plaintiff submits evidence that Canadian
21 authorities believe Defendant Loewen has no criminal record and that the corporate Defendants
22 had obtained licenses to operate in British Columbia. (Dkt. No. 5 at 4-9.) While Plaintiff offers
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1 evidence that one or more of the businesses may have been sold in recent months, Plaintiff points
2 to no evidence suggesting that any sale relates to fraudulent activity. (Id. at 9-10.)

3 Plaintiff's assertions that Defendants "operate outside the territorial jurisdiction of the
4 United States" and that "funds are diverted to foreign bank accounts" also do not withstand
5 scrutiny. Offshore operations often raise suspicions. See, e.g., FTC v. Affordable Media, LLC,
6 179 F.3d 1228, 1232 (9th Cir. 1999) (existence of defendants' funds in a trust in the Cook
7 Islands supports entry of an ex parte TRO to prevent dissipation). However, Defendants here
8 have an obvious explanation: they run a business based in British Columbia. (Dkt. No. 4 at 199.)
9 It makes sense that Defendants would have Canadian bank accounts because Defendants are
10 Canadian. (Id. (stating that Loewen has a British Columbia driver's license and a Canadian
11 passport).) Also, Canada is not the Cook Islands. The fact that the FTC has already cooperated
12 with Canadian law enforcement—including preparing a declaration filed with motion—weakens
13 Plaintiff's assertion that Defendants would be beyond reach in Canada. (Dkt. No. 4 at 1.)

14 3. Scope of Proposed TRO

15 The scope of the proposed TRO is also overly broad. An ex parte TRO must be "narrow
16 enough . . . to protect the interests of the defendants." AT&T Broadband, 381 F.3d at 1319.
17 Plaintiff seeks a TRO that (1) requires Defendants to immediately cease their deceptive
18 practices; (2) freezes Defendants' assets, wherever located; (3) requires Defendants to provide
19 the FTC with completed financial statements; (4) authorizes expedited discovery; and (5)
20 provides additional ancillary relief. (Dkt. No. 3 at 19.)

21 Plaintiff's proposed TRO would effectively shut down all aspects of Defendant's
22 business without requiring Plaintiff to meet any standard of proof. It would prohibit Defendants
23 from stating to customers (1) that Defendants have identified a buyer for a consumer's vehicle,
24 (2) that consumers who purchase Defendants' services are likely to be successful in selling their

1 vehicle within 90 days, and (3) that Defendants will refund the initial fee if the consumer
2 purchases a refund insurance policy. (Dkt. No. 3-1 at 6.) While Plaintiff alleges that these types
3 of statements are the core of the fraud, these statements also appear to be the core of Defendants'
4 business. Enjoining Defendants from making these statements, without notice or the opportunity
5 for any kind of hearing, implicates important due process rights.

6 The proposed asset freeze is also overly broad. It covers "Defendants, and their officers,
7 agents, servants, employees, and attorneys" and prohibits them from any kind of financial
8 transaction, excepting only the individual Defendant, who may pay his ordinary living expenses
9 "upon prior written agreement with the Commission." (*Id.* at 10.) Plaintiff makes no showing
10 that its proposed TRO is narrowly tailored to protect the public interest while respecting
11 Defendants' due process rights.

12 4. Motion to Seal

13 Plaintiff files a motion to seal the entire docket and record until Defendants have been
14 served. (Dkt. No. 2.) Local Rule CR 5(g) requires that a motion to seal shall provide a specific
15 description of particular documents or categories of documents a party seeks to protect and a
16 clear statement of the facts justifying sealing and overcoming the strong presumption in favor of
17 public access. Plaintiff's assertions that unsealing would render fruitless the prosecution of this
18 action, together with the temporary nature of this request to seal, are sufficient to meet the
19 requirement of Local Rule CR 5(g). Plaintiff's request that the record remain under seal until 72
20 hours after a TRO is issued or all Defendants have been served, whichever occurs first, is
21 granted. (Dkt. No. 6 at 6.)

22 **Conclusion**

23 Because Plaintiff does not meet the notice requirement of 15 U.S.C. § 53(b) and does not
24 meet the requirements of Fed. R. Civ. P. 56(b) allowing a TRO to be issued ex parte, Plaintiff's

1 motion for entry of a TRO is DENIED. However, Plaintiff is GRANTED leave to amend its
2 motion to provide evidence that Defendants are likely to dissipate assets or dispose of evidence.

3 Plaintiff has 10 days from the entry of this order to refile its motion for an ex parte TRO.
4 Alternately, if Plaintiff provides notice to Defendants and informs the Court that it wishes to
5 renew its motion, the Court shall set an expedited briefing schedule and determine whether the
6 balance of the equities and Plaintiff's likelihood of success on the merits justify the entry of a
7 TRO.

8 Plaintiff's motion to seal is GRANTED. The record shall be sealed until 72 hours after a
9 TRO is issued or until all Defendants have been served, whichever occurs first.

10 The clerk is ordered to provide copies of this order to all counsel.

11 Dated this 24th day of July, 2012.

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15 Marsha J. Pechman
16 United States District Judge
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